without express customer approval is not necessary to protect consumers and is contrary to customer expectations.

Section 10(a)(3). Forbearance is in the public interest because it will reduce carriers' administrative costs to communicate with customers, and improve the effectiveness of those communications. Forbearance also will allow carriers to begin an effective roll-out of ADSL and other advanced services without delay or customer confusion. This will assure that customers learn of opportunities for vastly improved Internet access and also mitigate a principal source of blockage and overload from the PSTN. Use of ADSL service by customers who formerly used the PSTN for extended calls to an ISP will help all members of the public by decreasing the likelihood of network blockage and avoiding the massive investments carriers are now required to make to "shore up" the PSTN.[44]

Competition will not be affected adversely because, for the time being, the necessary modem can only be obtained through the ADSL service provider or the end user's ISP, and this is true of any other competing ADSL providers, as well as GTE. Forbearance allowing use of CPNI to market ADSL modems as part of the ADSL package is not anticompetitive. GTE and other carriers are already free to use CPNI to market ADSL service, and they may also sell ADSL modems along with ADSL service. Being able to use CPNI to sell ADSL with an appropriate modem does not give the carrier market power in either ADSL or in modems. It merely permits the carrier to act

[44] These investments could result in millions of dollars of stranded investment in the future if predictions of the immense growth rate of IP-based telephony are accurate.

in accordance with customer expectations. Any ADSL provider's long-run interest will be served by the development of a competitive modem market, which will make ADSL service more affordable by a larger customer base. However, in the near term, as the service is being introduced, GTE needs the ability to ensure that customers can obtain the needed CPE. Thus, the effect on competition is only positive, as forbearance will enhance the ability of carriers to introduce new and improved competitive services and products. For these reasons forbearance is in the public interest.

C. Voice Mail, Store-and-Forward, and Short Message Services

In the *CPNI Second Order*, the Commission lumped together "voice mail or messaging" with virtually all other information services when it concluded that these services do not fall under either Section 222(c)(1)(A) or (B).[45] Under this view of the statute, carriers will need express approval from the customer to use CPNI to market those services. The Commission should reconsider the applicability of Section 222(c)(1) to voice mail, store-and-forward, and short message services or, in the alternative, forbear from the application of this restriction due to the close relationships between voice mail in both wireline telephone service and wireless service, and the importance of short message service to wireless service.[46]

[45] *CPNI Second Order* ¶¶ 47, 72-74.

[46] This is not to suggest that voice mail is a telecommunications service. To the contrary, voice mail is properly classified as an information service. *See* Petition of Telecommunications Resellers Association for a Declaratory Ruling that Voice Messaging Services Must Be Made Available for Resale at Wholesale Rates Pursuant to Section 251(c)(4) of the Communications Act, As Amended, CCB/CPD 98-16, Comments of GTE (filed April 21, 1998). *See also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report to Congress*, FCC 98-67 (rel. April 10, 1998). While *forbearance from Section 222 regulation* is wholly appropriate based

(Continued...)

1. Section 222(c)(1)(B) Allows the Use of CPNI Without Customer Approval To Market Voice Mail, Store-and-Forward, and Short Message Services

For many customers, carrier-provided voice mail and wireless short message service[47] have become an integral part of their telecommunications service. These services have traditionally been marketed together with the underlying telecommunications service. Customers think of them as part of their total service, and use them to augment the service. Only a handful of customers could ever distinguish the legal categories for vertical services—which of them are "telecommunications" versus which are not.

Voice mail and short message service serve the important function of receiving messages when a caller cannot get through to the person dialed. Incomplete calls may be due to the fact that the called party is talking on the line or working on the Internet, a CMRS handset is not within a coverage area or the customer cannot reach the phone (*e.g.*, elderly, disabled, small business with work offsite). Voice mail service is integral to CMRS because customers turn off their phones to conserve battery life. The customer has a need to ensure that during this down time he or she can receive messages. Thus, voice mail is an integral part of the total service package offered by the carrier.

(...Continued)
upon customer expectations and within the Commission's Section 10 discretion, this does not mean that the Commission has authority *to extend Section 251 regulation* to information services, as TRA and its supporters suggest.

[47] Short Message Service ("SMS") is an integration of the pager with digital service. Digital handsets include a display that will allow a SMS message (alphanumeric page) to be presented to the customer.

Finally, voice mail or short message service can serve the customer when the receiver is unreachable due to network blockage or poor radio reception.[48] For these reasons, voice mail and CMRS short message service perform functions akin to call waiting and call forwarding, namely to complete the communications path to the customer when normal reception is unavailable. The *CPNI Second Order* correctly recognizes that call waiting and call forwarding are necessary to, or used in the provision of, telecommunications service within the meaning of Section 222(c)(I)(B). However, it fails to give a reasoned distinction between those services and voice mail or short message service. In fact, many business customers with call forwarding, call waiting and/or caller ID usually obtain voice mail as part of their service. This is a clear indication that customers view voice mail as part of the total service package along with call forwarding and waiting. Indeed, all of these services are necessary components of a state-of-the-art end-to-end communications path for wireless and wireline customers.

The *CPNI Second Order* purports to encourage carriers to package services that customers need[49] and the *Clarification Order* allows use of information derived from an information service that is part of one package to be used to market another package. However, the "package-to-package" scenario will not always apply, for example, in the case where the carrier sold only the telecommunications service originally or where it

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[48] In the CMRS environment, there are situations in which calls cannot get through that are beyond the control of the CMRS provider and the customer. Incomplete calls may be due to the fact that the handset has lost its charge, the handset is not within the coverage area or the radio signal is masked from the handset (i.e. - the handset is in a tunnel, elevator or under a bridge).

[49] *CPNI Second Order* ¶ 24.

wishes to market only a new information service. The restriction on using CPNI to market voice mail or short message service will effectively prevent wireline and wireless carriers from identifying customers who would most benefit from these products, for example, by analyzing call completion statistics.

The CPNI Second *Order* did not closely examine the differences between voice mail or short message service and other information services. The Commission would be justified in concluding, upon reconsideration, that these information services are integral or adjunct to the associated communications service.

2. The Commission Should Forbear From Applying Section 222 To Prevent the Use of CPNI Without Customer Approval To Market Voice Mail, Store-and-Forward, and Short Message Services

Section 10(a)(1). Permitting carriers to use CPNI to market voice mail, store-and-forward, and short message services would not lead to unreasonableness or discrimination in telecommunications services, because, as the Commission acknowledges, these information services are not telecommunications services. Nothing in the Communications Act requires that information services have charges, practices, classifications, or regulations that are reasonable and nondiscriminatory and, therefore, preventing the use of CPNI without customer approval to market these services is not necessary to ensure reasonableness and nondiscrimination regarding information services. Moreover, no carrier has market power in these information services markets. In particular, CMRS carriers are nondominant. There is no need to prohibit use of CPNI to market these services without customer approval to protect even incumbent LECs' customers. The Commission's cost accounting and affiliate transactions rules, to say nothing of State PUC regulation of local service rates, ensure that telecommunications customers will not pay unreasonable prices regardless of the use of CPNI to market closely related information services.

Section 10(a)(2). For these same reasons enforcement of a prohibition on use of CPNI is not needed to protect customers' pocketbooks. And, because these services are closely tied in customer's minds to the telephone or CMRS services they support, enforcement is not needed to protect consumers' privacy. Customers desire telecommunications services to be supported by store-and-forward information service such as voice mail or SMS to achieve the convenience and reliability of communications they require. In many (but not all) cases, consumers acquire these elements as a package. Given the fact that customers already expect these products to be marketed with, or even packaged with, the underlying telecommunications service, and that business customers purchase these services as a group, consumers will expect their carrier to use their CPNI to filter the carrier's marketing, so that customers will be made aware of relevant options and new services, yet not annoyed or confused with the irrelevant.

Section 10(a)(3). The public interest is served when consumers can receive information from their carriers and learn about important service augmentations that will make the use of telecommunications service more efficient. Forbearance is in the public interest because it will reduce carriers' administrative costs to communicate with customers, and improve the effectiveness of those communications. Forbearance also will make it more likely that customers will use telecommunications services efficiently and thus reduce demands on the system from, for example, repeated calls with no answer. Forbearance will enhance the ability of carriers to introduce new and improved competitive telecommunications and information services and thus promote competition.

III. The Commission Should Allow the Use of CPNI To Market Enhancements to Packages of Telecommunications Services

A. Enhancements to Telecommunications Packages Are Within the Total Service Approach

As the Commission has repeatedly acknowledged, telecommunications customers increasingly desire packaged service offerings that include two or all three of the categories identified in this proceeding—local, interexchange, and CMRS. The *CPNI Second Order* expressly acknowledges that changing customer demands, driven particularly by CLEC marketing strategies, will impact the "total service approach".

> "Although most customers presently obtain their service from different carriers in terms of traditional categories of offerings – local, interexchange, and commercial mobile radio services (CMRS) -- with the likely advent of *integrated and bundled service packages*, the "total service approach" accommodates any future changes in customer subscriptions to integrated service."[50]

> "Although the total service approach would still require that we maintain some service distinctions, *unless and until customers subscribe to integrated products*, it facilitates any convergence of technologies and services in the marketplace.[51]

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[50] *CPNI Second Order*, ¶ 24 & n. 99 (*citing* ¶ 58) (emphasis added).

[51] *Id.* ¶ 58 (emphasis added).

CLECs are basing their market entry plans upon the offering of integrated service packages and they intend to serve precisely the customers which the *CPNI Second Order* explicitly recognizes should not be bound by rigid service distinctions. For example, once a new CLEC customer subscribes to a service package, that customer will welcome information about any enhancements to the package, irrespective of the service categories defined by regulation. Indeed, this customer information flow is part and parcel to the total service relationship. For example, a customer may initially subscribe to a packaged offering of local and long distance service for $25 per month. Later the carrier may offer an enhanced package that includes local, long distance, and wireless service for $35 per month plus 200 free long distance minutes. Customers will expect and desire that the carrier use their CPNI from the initial package to inform them of this potentially much more attractive package.[52]

The *CPNI Second Order* states that "[u]nder the total service approach, the customer's implied approval is limited to the parameters of the customer's existing service."[53] In the case of packaged services, the customer will regard the package, not the individual components, as comprising his or her total service offering. Even if an enhancement to an initial (or partial) package involves adding a service from another

[52] While it is readily apparent that integrated service packages will primarily be offered by CLECs, the same reasoning applies to customers of any telecommunications carrier who specifically subscribe to integrated service packages. As the *Order* correctly recognizes, Congress did not intend that distinctions be made between particular classes of telecommunications carriers with respect to the application of the CPNI rules. *Id.* at ¶ 50.

[53] *CPNI* Second *Order* ¶ 25.

category, the customer will continue to consider the relationship with the carrier to be defined by the package itself, not by the regulatory categorization of the package's components. This situation is distinguishable from a customer who obtains only one service category, or two categories obtained on a stand-alone basis, where, the Commission has concluded that the customer has given implied approval to use CPNI only within the specific category or categories.[54]

Nothing in Section 222 prohibits the use of CPNI derived from a service package to enhance the package. The language of the Section allows a package to be regarded as a "service." The test of whether an offering is a service is the Commission's "total service approach" based on customer perceptions and expectations. Customers may well, as the Commission believes, regard local, long distance, and CMRS as separate services when they are purchased individually, perhaps from different companies or under different trade names or with separate pricing plans and billing. Under these circumstances, Section 222(c)(1) would apply to each separate bucket as the Commission has specified. From the customer's perspective, the situation is quite different for service packages. With separate offerings, the customer's perception is that he or she is buying two different services. In the case of a package, the customer perceives a single service, probably marketed under a single brand name, priced as a package, and not available from the provider as separate services. Therefore, on reconsideration the Commission should specify that enhancement to service packages

[54] *CPNI Second Order* ¶ 58

will remain within the total service relationship regardless of local/long distance/CMRS distinctions.

In the event the Commission does not establish a rule that permits enhancements to a total service package, it should, at a minimum, adopt a rule that allows carriers offering packaged services to use CPNI to identify those customers which might benefit from a new and improved package. Under this approach, the carrier would contact each of the selected customers and ask for consent to market enhancements to the customer's total service package before any marketing takes place. Because such a rule would still require customer consent, it would adequately protect the privacy interest of consumers. At the same time, such a rule would be a practical compromise and avoid the problem of costly, untargeted marketing by carriers.

Such a regime would ensure that carriers could use CPNI to determine accurately which customers would benefit from certain enhancements in their service. Such a rule would be invaluable where a carrier offers a discount based on usage. For example, a CLEC that offers a 10% discount on the total bill for customers who incur $75 or more a month can assess which customers are near the $75 cut-off. In turn, those customers which have long distance and local service at the $70 level could be offered an additional service (e.g. paging at $6.95/month) that puts the customer over the $75 threshold and enables them to take advantage of the discount. The addition of paging would, in fact, reduce the customer's bill while he gets "free" paging as part of the bundle. However, because only select customers would benefit from such campaigns, the Commission should craft a rule that does not require carriers to market indiscriminately these targeted promotions.

B. The Commission Should Forbear From Applying Section 222 To Prevent the Use of CPNI Without Customer Approval To Market Service Package Enhancements

Section 10 justifies forbearance from restricting the use of CPNI to market service package enhancements.

Section 10(a)(1). Any service package will necessarily include at least one service (long distance or CMRS) that the Commission recognizes as competitive and supplied by nondominant carriers. The market will assure that competitive elements of packages are priced reasonably. If a service regarded as noncompetitive is in the package, that service will also be available from the dominant carrier unbundled and at rates that are subject to state and federal regulation. The net result is that service packages will not involve unreasonable or unlawfully discriminatory charges or terms. The use of CPNI to market an enhancement to the package likewise cannot lead to unreasonableness or discrimination due to market and regulatory controls. Even if an incumbent local carrier offers packaged services, it will remain bound for now to offer each service under tariff, and therefore *a la carte* as well.

Section 10(a)(2). Prohibiting the use of CPNI without customer approval to market package enhancements is not necessary to protect consumers. Customers of packages have already shown that they are interested in a one-stop-shopping approach to meet their telecommunications needs. Such customers will welcome—not reject as an invasion of privacy—offers for enhancements to the package, particularly if the enhancement makes sense based on the customer's needs, which can be determined by analyzing CPNI. Without forbearance, carriers would have to rely on less specific marketing techniques, with the attendant customer confusion that results from package offers that are irrelevant to the customer's needs.

Section 10(a)(3). Forbearance is in the public interest because it will reduce carriers' administrative costs to communicate with customers, and improve the effectiveness of those communications. Forbearance will enhance the ability of CLECs to introduce new and improved competitive services and products. For example, GTE's own competitive local exchange carrier ("CLEC"), as well as other CLECs (see the attached declaration of Kevin Snyder), intends to pursue a strategy of packaged service offerings in order to enter into new markets. CLECs believe that this is the most effective way to provide a competitive alternative, *i.e.*, by differentiating their packaged service offerings from the *a la carte* services which ILECs must provide pursuant to tariff. The use of CPNI is pro-competitive because selling and expanding packages is the most effective strategy for entry into new markets by a CLEC.

Finally, the public interest will be served if consumers can readily be informed of enhancements to integrated service packages, without artificial constraints based on service categories. Nor will such use of CPNI harm competition because it will, instead, give competitive carriers more effective means to penetrate new markets by reaching the high-value customers who will be interested in packages of services.

Allowing carriers to use CPNI from an initial package to market subsequent, enhanced packages will promote the rapid growth of competition and will give customers information about the greatest variety of choices, without adversely impacting customers' CPNI rights. Yet, the *Order* does not address this other than to speculate that once a carrier has established a customer relationship involving all three packages, "[t]he categories would instead disappear naturally as customers begin purchasing integrated packages, without need for Commission intervention."[55] GTE urges the Commission to take a broader view with respect to integrated packages and treat any such package as establishing a sufficiently comprehensive customer-carrier relationship to obviate the need for customer approval to use CPNI and, if necessary forbear from any contrary interpretation of Section 222.

IV. The Commission Should Reject the Anti-Win Back Rule, Which Is Inconsistent with the Plain Meaning of the Statute and Violates the Takings Clause of the Constitution

In the context of discussing how a carrier may use a customer's CPNI, the Commission adopted a rule, which states "[a] telecommunications carrier may not use, disclose or permit access to a former customer's CPNI to regain the business of the customer who has switched to another service provider."[56] The Commission concluded that Section 222(d)(1) does not authorize a carrier to use CPNI of a former customer because such use is not to "initiate service." In addition, the Commission also stated its belief that such use is not permitted under Section 222(c)(1) because such use is not undertaken "in the provision" of service. Therefore, the Commission concluded that customer approval may not be inferred because the use is outside of the customer's existing service relationship within the meaning of Section 222(c)(1)(A). For the following reasons, the Commission should reject this interpretation of the statute on reconsideration or, if necessary, forbear from implementing an anti-win back rule.

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[55] *Id.*

[56] 47 C.F.R. § 64.2005(b)(3).

A. The Use of CPNI To Retain and Win Back Customers Is Authorized by Section 222(c)(1) of the Act

Initially, and despite the reference in paragraph 85 of the *Order* to a "soon-to-be former" customer, neither the rule, nor the statute prohibit a carrier from using CPNI to retain an *existing* customer who may be contemplating a possible switch to a competitor. Thus, a customer may call a carrier, indicating an intention to switch to another carrier, with the expectation that the first carrier may offer him or her a more favorable plan. With respect to wireless offerings, as experience has shown, when markets become more competitive and customers become more sophisticated, customers will frequently "shop" competing plans among carriers, including their existing service provider, to ensure that they have obtained the best deal.[57] This is, in fact, one of the most favorable results of competition from a customer's perspective. This marketplace reality was contemplated in Section 222(d)(3) of the Act which specifically permits inbound telemarketing on customer initiated calls. The Commission must reconsider the anti-win back rule because, as currently drafted, it is inconsistent with the statutory (d)(3) exception. In accordance with the total service approach, however, carriers must continue to use such a customer's CPNI to evaluate whether an alternative plan better meets the customer's needs.

Even in cases where the customer has terminated service and the carrier knows that the customer has switched to another carrier, the Commission's anti-win back rule is clearly inconsistent with the statute. Nowhere in the statute is there any provision

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[57] *See* Wall Street Journal, "For Wireless Services, Talk Gets Far Cheaper As Competition Rages", April 27, 1998, p. A1.

that prohibits a carrier from using CPNI of a customer to win back the former customer. On the contrary, Section 222(d)(1) clearly authorizes a carrier to use CPNI in its possession to "render" service to the customer regardless of the status of the customer.

Contacting a customer in order to begin the process of rendering service to a former customer falls squarely within the statutory language that authorized CPNI use, even without specific customer approval. Contacting the customer following service disconnection is a typical action involved in "rendering" service to the customer in order to determine why the customer changed service providers and to determine how to improve service in the future. It is also natural for the company, in the context of such follow-up contacts, to attempt to satisfy the customer's concerns, including offering, for example, a rate plan that may better meet the customer's needs based upon usage, calling patterns, etc. Subsection (d)(1) clearly authorizes use of CPNI to make a follow-up customer contact. Therefore, the Commission is without power to interpret the statute in a way that is inconsistent with the plain meaning of the statute's provisions.[58]

Second, the rule the Commission adopted is clearly overbroad because it could be read to prohibit carrier use of CPNI to win back a customer, even though the customer has previously given actual approval to use its CPNI. Section 222(c)(1) clearly permits a carrier to use CPNI of a customer with its approval. As the *Order* recognizes, where the customer has given implied approval for use of CPNI within a

[58] *Chevron, U.S.A., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Indeed, the Commission does not attempt to explain how the statute does not even address how the follow-up contact it calls a "win back" situation does not fall within the definition of rendering service.

service category, that approval remains valid until the customer actually terminates service and notifies the carrier that service has been obtained from a competitor.[59] In contrast, with respect to actual approval for use of CPNI, such approval need only be obtained once and remains valid until expressly revoked.[60] Therefore, it would be inconsistent with the statute to prohibit use of CPNI during a follow-up or "win back" situation after a customer has granted explicit approval to use such information, until the customer revokes that approval.[61]

Third, prohibiting CPNI use during a follow-up or win back situation is anticompetitive. The clearest and most vital opportunity for competition to work its magic for customers is precisely when the customer is changing carriers. To tie the first carrier's hands behind its back by prohibiting it from using CPNI that could help it improve its service or to develop a competitive alternative for the customer, deprives a customer of the benefits of competition: obtaining the least costly and most useful service from a carrier. As such, the Commission's overbroad reading of Section 222 is actually antithetical to the main goal of the 1996 Act, which is to promote competition. The Commission should not cripple competition by reducing the opportunity for

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[59] *CPNI Second Order*, Rule 64.2005(b)(3) Appendix B-Final Rules, ("A telecommunications carrier may not use, disclose or permit access to a *former* customer's CPNI to regain the business of the customer *who has switched to another service provider.*") (emphasis added).

[60] *CPNI Second Order*, Rule 64.2007(f)(2)(ix) Appendix B-Final Rules, ("[A]ny approval ... is valid until the customer affirmatively revokes ... such approval ...").

[61] Moreover, to the extent that a customer in writing affirmatively directs or approves disclosure of CPNI to, for example, a carrier's affiliates, the carrier is *required* pursuant to Section 222(c)(2) to make such disclosure.

competitive offers which would benefit consumers. Adopting a rule, as proposed by the Commission, will result in a competitive process that discriminates in favor of the second carrier[62] with no benefit to the consumer.[63] For all these reasons, the Commission should delete Section 64.2005(b)(3).

B. The Fifth Amendment Guarantees a Carrier's Right To Use CPNI To Retain and Win Back Customers

Prohibiting a carrier from using CPNI to win back a customer is an unconstitutional taking of a carrier's property.[64] A customer, together with its

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[62] In its May 19, 1998 Reply Comments in this Docket, MCI demonstrates its misunderstanding of the role of win back where it asserts that ILEC win back marketing is an abuse of power because ILECs use information obtained from local service resellers and IXCs. MCI Reply Comments at 4. ILECs, however, are forbidden from using such information. The behavior referred to by MCI may be unlawful but it certainly does not constitute win back. Win back is limited to information about a LECs' customers, not those other carriers.

[63] The MCI Reply comments argue that win back efforts will "freeze" competition. MCI Reply Comments at 5. However, win back will do just the opposite – it will provide customers with additional alternatives for service. MCI, however, would rather advance select the competitors rather than promoting competition or consumers welfare.

[64] CPNI is clearly property in that the carrier expended resources to establish a database of valuable information. In *Ruckelshaus v. Monsanto*, the Supreme Court determined that trade secrets, like certain other intangible property, are deserving of the protection of the Taking Clause. *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984). In making its ruling, the Court relied heavily on the Restatement definition of 'trade secret." The Restatement broadly defines a trade secret to include:

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

Restatement of Torts § 757, Comment b. CPNI falls squarely within that definition. The record in this proceeding clarifies that "[m]ost carriers acknowledge that they view CPNI as an important asset of their business, and many state that they hope to use CPNI as an integral part of their future marketing plans." *CPNI Second Order* ¶ 22. In fact, the

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information, is an asset of the carrier. A carrier spends substantial resources developing and retaining information about a customer in order to provide quality and continued service to that customer. Indeed, the value of any specific CMRS or wireline market is based, in part, on the number of customers within the market. Restricting a carrier from contacting its former customers seriously impacts this value. The takings clause prohibits the government from taking such property without just compensation.[65] Clearly, the Commission has not provided for any compensation for the reduction in value or the destruction of this asset. Furthermore, given that the statute does not specifically authorize such taking, the Commission is not free to interpret a statute in an overbroad manner that will effect that result.[66]

C. Section 10 Mandates Rejection of the Anti-Win Back Restrictions

In the event the Commission is not persuaded to withdraw its anti-win back rule because of its interpretation of the statute, it should forbear under Section 10 of the Communications Act from applying the statute as so interpreted.

Section 10(a)(1). The rule is not necessary to ensure just and reasonable pricing or other terms of telecommunications service. Because the rule has nothing to do with pricing, elimination of the rule cannot have a negative effect on such pricing. In

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Commission itself has concluded that CPNI is "commercially valuable to carriers." *CPNI Second Order* ¶ 2. This view has arisen because CPNI is a readily available compilation of potential marketing information. Therefore, CPNI is a trade secret. As such, it is protected under the Taking Clause pursuant to *Monsanto*.

[65] *U.S. Const.*, amend V.

[66] *Bell Atlantic v. FCC*, 24 F. 3d 1441 (D.C. Cir. 1994).

fact, as explained above, the anti-win back rule may work to prevent carrier initiated price breaks.

Section 10(a)(2). The rule is not necessary for the protection of consumers from unreasonable or discriminatory rates or terms because it will have no effect on them. Furthermore, in the win back situation, there are no concerns about customer privacy because the customer has been taking service from the first carrier, perhaps even for an extended period of time. Just as the Commission found that a customer expects a carrier to contact them in order to maintain quality services during the course of providing that service, the customer by implication has consented to the use of that information during follow-up or win back situations. What's more, use of CPNI to win back the customer is clearly for the customer's benefit if it results in the customer continuing to obtain needed service at the best price. Thus, not only is a customer not harmed if the Commission forbears from applying the anti-win back rule, the consumer specifically benefits from such action.

Section 10(a)(3). Third, elimination of the rule is in the public interest because, the anti-win back rule is anticompetitive, and therefore, inconsistent with the main goal of the 1996 Telecommunications Act and the Commission's procompetition policies. In addition, eliminating the regulation will not have any impact on any other statutory provisions or Commission regulation. Therefore, customers will continue to receive protections guaranteeing reasonable and nondiscriminatory pricing. Competition will not be harmed, because statutory interconnection obligations and other procompetition measures will continue in full force and effect. Therefore, the Commission is clearly justified in forbearing from applying Section 222 insofar as the Commission interprets it to prohibit use of CPNI in a win back situation.

V. The Commission Should Clarify that "One-Time" Proximate Notice of CPNI Rights Is Sufficient

The *CPNI Second Order* concludes that carriers need only provide one-time notification to customers of their CPNI rights.[67] Rule 64.2007(f)(3) provides that a solicitation for approval must be "proximate" to the notification of a customer's CPNI rights. Rule 64.2007(f)(4) requires that if the solicitation for consent is in writing, then it must be part of the same document as the notice. These rules appear to conflict in some respects. For example: (a) a carrier could send out written notice to its customers and then request consent orally at any timely proximately thereafter[68] (including multiple oral solicitations for consent), but (b) a carrier could not send out written notice and follow it up with a written solicitation for consent, unless that written solicitation also contained the written notice.

The Commission should clarify that written notice followed proximately by either a written or oral solicitation is sufficient and is consistent with the FCC's finding that "one time" notice is sufficient. This would assure that customers receive the notice that the Commission deems necessary, without confusing customers and without the unnecessary administrative burden on carriers that repeated notifications would entail.

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[67] *CPNI Second Order* ¶ 199.

[68] GTE would consider proximate notice to be that given within one year of the solicited consent.

VI. The Commission Should Clarify that Full Notice of CPNI Rights Is Not Required for Use of CPNI During Customer Initiated Calls

Section 222(d)(3) allows carriers to use CPNI to provide inbound telemarketing, referral, or administrative services with customer approval "for the duration of the call." Rule 64.2007(f) requires a one-time notification of CPNI rights prior to "any solicitation" for approval to use CPNI. This rule is extremely broad and could be read to include an inbound telemarketing solicitation under Section 222(d)(3).

The "Miranda-type" notice required by 64.2007(f) would interfere with the customer's ability to receive the service for which he or she called.[69] The statute does not require such a notice on these calls. Section 222(d)(3) is styled an "exception" to the requirement for approval. It is limited in time ("the duration of the call") and use ("to provide such service"). A 64.2007 approval to use CPNI, on the other hand, endures until revoked and can cover a wide scope of uses.

GTE requests the Commission to clarify that a request to a customer to use CPNI for the duration of an inbound (d)(3) call is not a "solicitation for approval" within

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[69] The extensive "Miranda-type" notice requirements are not needed to prevent carriers that gain customer consent from releasing reports detailing who the customer has called to third parties. This, however, is not a valid basis for the notice requirements for several reasons. First, the problem is potential and theoretical at best. There is no evidence in the record that carriers have or will disclose such information to third parties. Second, notice requirements will not directly address these concerns. GTE submits that concerns about the disclosure of "highly sensitive" CPNI to third parties are better handled directly through specific rules which forbid the disclosure of call detail rather than indirectly through extensive notice requirements covering even intracorporate use of CPNI. Third, customer consent is not immutable. If a customer determines that his carrier has disclosure policies that are inconsistent with his needs the customer can, at any time, withdraw consent.

the meaning of Rule 64.2007(f).[70] In the (d)(3) context, the customer need only be informed of the type of CPNI which the customer representative on the in bound call intends to use (*e.g.*, "your current list of services and usage") and the use of this CPNI (*e.g.*, "to see what rate plan would likely best meet your needs"). This approach reaches the correct balance between customer convenience and privacy.

VII. The Commission Should Clarify that Carriers Need Not Maintain Records of Notice and Approval for Customer Initiated Calls

Rule 64.2007(e) requires carriers to maintain records of notice and consent for at least one year. It would be an unreasonable administrative burden on carriers to maintain such records for the transitory and unpredictable types of customer-initiated calls covered by Section 222(d)(3). Given that the consent for CPNI use during a (d)(3) call is valid only for the duration of the call, such record keeping (particularly by way of TPV or recording) is unnecessary and is not required by the statute. Because the customer initiated the call, no privacy expectation of the customer would adversely affected by this clarification.

VIII. The Commission Should Limit the Use Restrictions to Systems Used for Marketing

Rule 64.2009(c) requires that carriers must maintain an electronic audit mechanism that track access to customer accounts. The Commission is mistaken in its belief that "[s]uch access documentation will not be overly burdensome because many carriers maintain such capabilities to track employee use of company resources for a

[70] The wording of rule 64.2007 broadly covers "any solicitation." However, such broad language could very well swallow the exception crafted in Section 222(d)(3) for inbound marketing. The Commission's rules should rectify this point of ambiguity.

variety of business purposes unrelated to CPNI compliance."[71] If applied to *all* systems, such an undertaking would impose a data processing burden on carriers that could rival Y2K requirements. Based on a preliminary review, in only one part of GTE Network Services, over 50 systems would be impacted.

GTE's requests that the Commission reconsider this rule and limit the audit requirement to systems which are used for marketing. Systems subject to Computer III access restrictions today are a significant but manageable fraction of all systems that contain CPNI in one form or another. This limit will adequately address competitive and privacy concerns without causing huge costs.[72]

IX. The Commission Should Clarify that Notification Need Not Exhaustively Specify All Types of CPNI and All Entities that May Receive It.

Rule 64.2007(f)(2)(ii) requires that a notification must "specify the types of information" that constitute CPNI and "the specific entities" that will receive it. GTE believes that giving the customer an exhaustive list of specifics would be more counter-productive to the goal of informed consent than reciting the statutory definition of CPNI, which the Commission has deemed insufficiently informative to the layperson. In order for customers to grant or deny consent on an informed basis, they must be provided with information in clear, understandable terms. For example, what services the

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[71] *Id.* ¶ 199.

[72] As currently drafted, rule 64.2009(c) will result in an unfunded regulatory mandate that will qualify for exogenous costs treatment and, therefore, lead to possible access rate increases.

customer subscribes to, usage of the services, billing information regarding these services.

Similarly, an exhaustive list of all of a carrier's subsidiaries and affiliates that may receive CPNI would confuse customers rather than inform them. GTE believes that customers will consider it useful to be informed, for example, that CPNI will be shared with the "GTE family of companies, which provide, local, long distance, wireless, data, Internet access, telecommunications products and services," but listing all these particular corporate entities by name would be meaningless to customers.

GTE requests clarification that this approach will be sufficient.

X. Conclusion.

GTE requests that the Commission reconsider and/or clarify the *CPNI Second Order* on the issues discussed above and forbear from enforcing any applicable provision of the Act as necessary if reconsideration is insufficient.

Respectfully submitted,

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May 26, 1998